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In the Supreme Court of the United States

OCTOBER TERM, 1984

NO. 84-1671

John W. Zeiler, et al., *Petitioners*

v.

Ohio High School Athletic Association, et al., *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully Submitted By:
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TABLE OF CONTENTS

Page

Reasons for Denying the Writ 1

Conclusion 6

Certification 7

CITATIONS

Cases:

Baldwin vs. Montana Fish and Game Commission,
436 U.S. 371 (1978) 1

Hamilton vs. Tennessee Secondary School Athletic Association,
552 F. 2d 681 (6th Cir. 1976) 4

Hicklin vs. Orbeck,
437 U.S. 518 (1978) 2

United Building & Construction Trades vs. Mayor of Camden,
U.S. 79 L. Ed. 2d 249 (1984) 2

Valencia vs. Blue Hen Conference,
476 F. Supp. 809 (D. Del. 1979) *affirmed without opinion,* 615 F. 2d 1355 (3rd Cir. 1980) 5

Wisconsin vs. Yoder,
406 U.S. 205, 92 S. Ct. 1526 (1972) 5

Zobel vs. Williams,
457 U.S. 55 (1982) 2

REASONS FOR DENYING THE WRIT

I. THE RESPONDENTS' RULE WHICH PROHIBITS OUT-OF-STATE STUDENTS FROM PARTICIPATING IN INTERSCHOLASTIC ATHLETICS SOLELY ON THE BASIS OF RESIDENCY DOES NOT VIOLATE PETITIONERS' RIGHTS UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION.

The Court below relied upon the case of *Baldwin vs. Montana Fish and Game Commission,* 436 U.S. 371 (1978) to hold that the residency rule of the O.H.S.A.A. does not violate any of the Petitioners' rights under the Privileges and Immunities Clause. The Court specifically pointed out the following language from that decision:

> When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State, . . . in the ownership and disposition of privately held property within the State, . . . and in access to the courts of the State, ...
>
> It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State . . . . No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State . . . . Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do . . . . Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with

respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally. (Citations omitted.)

In *Hicklin vs. Orbeck*, 437 U.S. 518 (1978), decided that same year, Justice Brennan indicated that there was a two-part test. First, "whether the presence or activity of nonresidents is the source or cause of the problem or effect from which the State seeks to deal" and, secondly, whether "the discrimination practiced against nonresidents bears a substantial relation to the problem they present." In the *Hicklin* case, it is quite clear that a "fundamental" right was involved because the issue involved the right of non-residents to participate in their occupation or trade. In the case of *Zobel vs. Williams*, 457 U.S. 55 (1982) at Page 71, Justice O'Connor acknowledged the continuing viability of the *Baldwin* approach to the Privileges and Immunities Clause analysis.

Since the decision of the Court below, this Court has given further guidance to the proper interpretation of the Privileges and Immunities Clause. In *United Building & Construction Trades vs. Mayor of Camden*, U.S. , 79 L. Ed. 2d 249 (1984), Justice Rehnquist at Pages 258 and 259 indicates that the application of the Privileges and Immunities Clause requires a two-step inquiry. The first step is to decide whether the rule burdens one of those privileges and immunities protected by the clause, citing the *Baldwin* case. Then this language from the *Baldwin* case is cited with approval: "Some distinctions between residents and nonresidents merely reflect the fact that this is a nation composed of individual states and are permitted; other distinctions are prohibited because they hinder the formation, the purpose of the development of a single union of those states. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the nation as a single entity must a state treat all citizens, resident and non-resident equally." Justice Rehnquist went on to state that the threshold matter is to determine whether an out-of-state resident's interest is sufficiently "fundamental" to the promotion of interstate harmony as to "fall within the purview of the Privileges and Immunities Clause." Petitioners give no explanation demonstrating how they meet this test.

The second test is that once it is determined that a protected

privilege is involved, then it must be decided whether or not reasons exist for discrimination and whether the degree of discrimination bears a close relationship to them. In light of the *United Building* case, it seems clear that this Court has maintained the position that it must be a fundamental right which is involved.

The Court below properly found that the right to participate in Ohio athletic activities on the secondary school level was not such a fundamental right. Courts of Appeals in the United States have uniformly found that the Due Process Clause of the Fourteenth Amendment does not provide a basis for relief for a high school athlete asserting that he is entitled to procedural due process regarding his athletic eligibility. *Hamilton vs. Tennessee Secondary School Athletic Association*, 552 F. 2d 681 (6th Cir. 1976).

Additionally, below the Court found that the adoption of the rule prohibiting out-of-state students from participating in interscholastic contests has had the effect of reducing tensions between public and private schools in the State of Ohio and that there was an improved spirit of cooperation between public and non-public schools since the rule became effective in July of 1979.

II. THE RESPONDENTS' RESIDENCY RULE DOES NOT ACT TO DENY THE PETITIONERS' FIRST AMENDMENT FREE EXERCISE OF RELIGION RIGHTS.

The Petitioners claim that the non-resident rule of the Respondent interferes with the rights of Petitioners under the Free Exercise Clause of the First Amendment. In fact, however, the by-law does not deny these parents or their children the right to actively practice the Catholic faith. Similarly, it neither prohibits the parents from enrolling their child in a Catholic high school, nor does it interfere with the ability of such a child to obtain a religious education provided by that school. The Court below found that this regulation was neutral on its face since it applies to students attending private sectarian schools, private non-sectarian schools and public schools alike. Petitioners rely on the case of *Wisconsin vs. Yoder*, 406 U.S. 205 (1972). In that case, this Court held that the threat of criminal sanctions which were placed over the Plain-

tiffs to perform acts undeniably at odds with the fundamental tenets of their religious beliefs was unconstitutional. No such sanctions nor any such required acts are involved in this case.

The Court below found that the First Amendment, which provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" was not applicable in this situation. See, *Valencia vs. Blue Hen Conference,* 476 F. Supp. 809 (D. Del. 1979) *affirmed without opinion,* 615 F. 2d 1355 (3rd Cir. 1980). In the *Valencia* case, the Court held that the complete exclusion of non-public high schools from an athletic conference did not violate the First Amendment requirement that the government maintain a position of neutrality in religion.

The operation of this rule has not unconstitutionally interfered with the constitutional rights of the Petitioners.

CONCLUSION

Respondents, therefore, respectfully request that this Court deny the Petition for a Writ of Certiorari based upon the reasons stated above.

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CERTIFICATION

I hereby certify that on this 17th day of July, 1985 three copies of the Response of Petitioners to the Petition for Writ of Certiorari were mailed, postage prepaid to Thomas G. Pletz, Attorney at Law, 1000 Jackson Street, Toledo, Ohio 43624 and David L. Kohler, Attorney at Law, 7928 Secor Road, Lambertville, Michigan 48144, Counsel for Petitioners. I further certify that all parties required to be served have been served.

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